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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

EDWARD J. MOORADIAN, Jr., Plaintiff and Appellant, v. CONVALESCENT CENTER MISSION STREET, Defendant and Respondent.	A122009 (City & County of San Francisco Super. Ct. No. CGC-06-452156)

The death of Edward Mooradian (decedent), appellant's father, generated litigation over the cause of his death.[1] Appellant sued Convalescent Center Mission Street (Center), where decedent had resided prior to his death, for wrongful death and elder abuse. Appellant now seeks review of the summary judgment entered in Center's favor, arguing that there are triable issues of fact concerning Center's liability and that the trial court improperly overruled his evidentiary objections. We affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

The operative complaint was filed on October 25, 2006. Appellant therein alleged that decedent was "88 years old, suffering from Alzheimer's disease, and unable to walk without assistance" and that Center "provided long term, around the

[1] Because appellant and his father shared the same name we refer to the former as "appellant" and the latter as "decedent."

clock, residential care" to decedent. Appellant alleged that decedent died on January 19, 2006, and that an autopsy revealed the cause of death to be "complications of blunt force trauma to the head." Appellant further alleged, on the basis of information and belief, that Center "acted with recklessness, oppression, fraud or malice and caused, or failed to prevent, [decedent] from suffering blunt force trauma to the head that caused [him] to suffer a subdural hematoma." On this basis, appellant alleged causes of action for elder abuse and wrongful death, and sought to recover punitive damages.

Center answered and then filed a motion for summary judgment, arguing that appellant could not "establish a triable issue of fact for his causes of action for elder abuse or wrongful death and [that] his prayer for punitive damages is not legally or factually supportable." Specifically, Center argued that appellant could not establish causation, or that Center committed a wrongful act or neglect, as required to recover for wrongful death. Center also argued that appellant could not establish the requisite element of recklessness, malice, oppression, or fraud required for recovery on an elder abuse claim.

Undisputed Facts[2]

Decedent was a resident of Center for more than six years, having been admitted on September 7, 1999, at the age of 84. Decedent was 90 years old at the time of his death. Decedent's medical conditions on admission included bipolar disorder, delusional disorder, gait impairment, psychosis, dementia, and coronary artery disease. Decedent was transferred to Center, in 1999, from St. Mary's Medical Center, where he received treatment and assessment for acute psychosis,

[2] "[T]he relevant facts are limited to those set forth in the parties' statements of undisputed facts, supported by affidavits and declarations, filed in support of and opposition to the motion . . . , to the extent those facts have evidentiary support. [Citations.] Facts not contained in the separate statements do not exist." (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 112; accord, Code Civ. Proc., § 437c, subd. (b)(1) & (b)(3).) Accordingly, we ignore appellant's attempts to include new facts on appeal.

declining gait ability, and incontinence. While at St. Mary's, in late August of 1999, decedent was only oriented to himself and his memory was graded a zero out of three.

During decedent's many years at Center, his health continued to deteriorate. As of January 2006, decedent had suffered hypertension, coronary artery disease, end-stage dementia, depression, associated brain atrophy, multiple ischemic cerebral-vascular incidents, bilateral hip and knee replacement surgery, and had been receiving aspirin therapy. Decedent suffered from severe dementia but could sometimes follow a single command and was verbally responsive to his name. Decedent was totally dependent for almost all of his activities of daily living, but was able to wheel himself around the hallways of the Center in a wheelchair and feed himself with supervision. Decedent was at extremely high risk of a fall, which would create substantial risk for head injury and subdural bleeding. During the months leading up to the incident, decedent suffered from confusion, disorientation, agitation, and aggressiveness, but was generally stable, with no crises or falls noted.

On the morning of January 11, 2006, decedent did not exhibit any aggressive behavior toward other residents, but was noted to be confused. Around 2:20 p.m., Center staff noticed, while decedent was doing his exercises, that his hand was swollen, he could not lift his left hand, and he was dragging his left foot.[3] Center staff then assisted him to bed and checked his vital signs.[4] Because decedent's blood

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[3] Appellant disputes this fact. Although he concedes that the nurses' notes so state, appellant claims that he was left a voicemail explaining that his father had a stroke and that the charge nurse told him his father was found in bed in a non-responsive state. Appellant also asserts that "decedent died from complications of blunt force trauma to his head that causes a subdural hematoma[,] which indicates the nurse's notes are false and misleading."

[4] Appellant disputes this fact. Appellant claims that the charge nurse told him his father was found in bed in a non-responsive state and that is when 911 was called. Further, appellant noticed swelling to decedent's head when he visited him at the hospital on January 11, 2006. Photographs taken by appellant on January 18, 2006, indicate bruising to decedent's head.

pressure was extremely high (233/200) his physicians were immediately notified and he was transferred, via ambulance, to St. Luke's Hospital.[5]

On admission to St. Luke's Hospital, decedent was seen in the emergency room where a CT scan revealed an extensive, right temporoparietal and frontal, acute subdural hematoma, measuring up to 10 millimeters in thickness with a 5-millimeter midline shift to the left. A subdural hematoma is a type of stroke, which is caused by trauma to the head or rapid acceleration/deceleration of the head (commonly known as whiplash).

According to Center's expert, Steven J. Holtz, M.D. (Dr. Holtz), these are the types of injuries that routinely go unnoticed in nursing facilities and are extremely difficult to prevent.[6] Dr. Holtz also opined that it is very difficult to prevent these types of patients from falling. Decedent suffered from a lack of balance, caused by three elements: (1) the impairment of balance function/gyroscope of the brain (known as the cerebellum), which the CT scan revealed had been damaged in prior years; (2) impairment of his vision due to macular degeneration and cataracts, which naturally occurs in aging patients; and (3) the impairment of nerves in his hands and feet, which severely limited his ability to know where he was in space.

The doctor performing the neurological examination at the hospital spoke to appellant (decedent's surrogate decision maker), who expressed the desire that a "do not resuscitate/do not intubate" order be in place during his father's hospital stay. The report of Bruce McCormack, M.D. (Dr. McCormack) stated: "[N]o falls or trauma w[ere] noted."[7] Dr. McCormack's report further stated: "There is no

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[5] Appellant disputes this fact for the same reasons stated above.

[6] Appellant objected to this portion of Dr. Holtz's declaration, as well as paragraphs 20, 22, and 25, on the grounds that no foundation had been established and that his opinion was based on speculation.

[7] Appellant disputes this fact. Although appellant concedes that the report does so state, appellant points out that Dr. McCormack testified at his deposition that he "[did not] know where [he] got the information."

external evidence of head injury."[8] Dr. McCormack discussed decedent's treatment options with appellant and it was determined that decedent would not likely survive surgery. Instead, it was decided that decedent would receive close neurological observation.

Decedent died on January 19, 2006. The medical examiner determined that decedent died from "complication[s] of blunt force trauma to the head," but could not be certain how or when that trauma occurred.[9]

Dr. Holtz further opined: "To a reasonable degree of medical probability, based on my review of the documentation, [decedent] suffered an injury through no fault of the nursing staff but by the failings of his own nervous systems."[10] He continued: "To a reasonable degree of medical probability, based on my review of the documentation, I have no reason to believe that [Center] took anything other than all appropriate actions with regard to [decedent]'s care including care planning

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[8] Appellant disputes this fact for the same reasons as noted above.

[9] Appellant disputes this fact. Appellant points out that the medical examiner determined the "manner" of the death to be an "accident." Appellant also claims that the medical examiner testified at deposition that decedent's injuries were consistent "with trauma caused by a fall or accident as the only two possible causes." However, the medical examiner's deposition transcript provides: "I was looking for something that, you know, was going to explain what happened. You know, being a medical examiner's office, we investigate cases and we always are very suspicious. You know, I knew when he came in he could have been a homicide. Somebody could have pushed him. It wasn't necessarily an accident. Now, none of that kind of information came out. So I'm looking to see what happened. Did he fall, probably. But I don't know that." She further testified: "[I]t's my opinion it's an accident. There's no reason to think somebody did this to him maliciously. Nobody reported anything like that. It just makes sense that, you know, he's an old gentleman who is set up to fall or needed—I know he needed help getting in and out of bed and using a wheelchair, et cetera." The medical examiner also testified that she did not specifically know what blunt force trauma caused decedent's subdural hematoma.

[10] Appellant disputes this fact. He points out that the medical examiner determined the "manner" of the death to be an "accident" and "unnatural." The medical examiner was also of the opinion that decedent's death was caused by blunt force trauma to the head.

assessment and evaluations. I also have no reason to believe that [decedent] received anything other than a high level of care throughout his stay at [Center.][11] [¶] To a reasonable degree of medical certainty, based on my review of the documentation, [Center] took all appropriate steps on January 11, 2006 when they noticed that [decedent] was suffering from left side weakness in immediately assessing his condition, calling 911 and transferring him to the acute care center." Finally, Dr. Holtz concluded: "To a reasonable degree of medical probability based on [decedent]'s medical diagnoses and my review of his medical records and my experience, the death of [decedent] was not related to anything the staff did or did not do with respect to [decedent]'s care. Nothing the staff of [Center] did or did not do was a substantial contributing factor in [decedent]'s death. Instead, [decedent]'s death was caused by the natural progression of his diseases, underlying medical problems and disease processes."[12]

Dr. McCormack testified at deposition that he "[did not] know if [the trauma was] related to any negligence or not." Likewise, the medical examiner testified that she did not know what blunt force trauma caused decedent's subdural hematoma.

Opposition and Trial Court's Order

Appellant opposed Center's motion for summary judgment, objecting to the declaration submitted by Dr. Holtz and arguing in relevant part that "[i]f decedent fell[,] [Center] is negligent as he could not walk or get out of his chair of [*sic*] bed by himself." Appellant argued that "it is clear from the evidence that he had a fall or accident that was not charted because he had a subdural hematoma caused by blunt force trauma and [Center] studiously avoids noting any accidents or falls. Where else could this blunt force trauma have happened if not at [Center's] facility?"

The court granted Center's motion for summary judgment, stating "there is no evidence as to what caused decedent's injury based on all the available records and

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[11] Appellant disputes this fact for the reasons previously stated.

[12] Appellant disputes this fact for the reasons previously stated.

the parties' opportunity to conduct discovery." The court stated: "Giving every reasonable inference to [appellant's] facts, there is no evidence that [Center] employees were negligent in caring for [decedent], let alone reckless. What [appellant] is asserting is that his father was in the care of [Center], he sustained an injury and [Center] is liable; that amounts to a claim of strict liability but [appellant's] burden is more than that and he has not presented triable issues of fact demonstrating a basis to sustain his claim." The court further concluded that "Dr. Holtz's opinions are admissible based on his expertise and the foundation set forth." After judgment was entered in favor of Center, appellant filed a timely notice of appeal.

II. DISCUSSION

Appellant contends the trial court erred by granting summary judgment. He maintains that triable issues of material fact exist and that the trial court improperly considered Dr. Holtz's declaration. Appellant argues, without citation to any evidence in the record, that "the blow to the head was most likely sustained in a fall which occurred during the decedent's exercises while only one staff member assisted him rather than two as required. . . . The only other possible explanation is that the fall occurred when decedent either fell out of his wheelchair or bed, in turn, meaning he was not secured in either." We consider appellant's arguments as they relate to each cause of action.

A. California Summary Judgment Law

"[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*); accord, Code Civ. Proc., § 437c, subd. (c).)[13] A defendant moving for summary judgment must make a prima facie showing either that the plaintiff cannot

[13] All further statutory references are to the Code of Civil Procedure unless otherwise specified.

establish one or more elements of a cause of action or that there is a complete defense to the action. (§ 437c, subds. (o)-(p); *Aguilar, supra,* at p. 850.) A defendant moving for summary judgment may satisfy this initial burden of production by presenting evidence that conclusively negates an element of the plaintiff's cause of action or by relying on plaintiff's factually devoid discovery responses to show that plaintiff does not possess, and cannot reasonably obtain, evidence to establish that element. (*Aguilar,* at pp. 854-855; *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 780 (*Saelzler*); *Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1593; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 590.)

If the defendant makes such a showing, the burden shifts to the plaintiff to present evidence showing there is a triable issue of material fact. (*Aguilar, supra,* 25 Cal.4th at p. 850; *Saelzler, supra,* 25 Cal.4th at p. 780.) A triable issue exists if "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra,* at p. 850.) "All doubts as to whether there are any triable issues of fact are to be resolved in favor of the party opposing summary judgment." (*Ingham v. Luxor Cab Co.* (2001) 93 Cal.App.4th 1045, 1049.)

On review of an order granting summary judgment, "we independently examine the record in order to determine whether triable issues of fact exist to reinstate the action." (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) "In performing our de novo review, we view the evidence in the light most favorable to plaintiffs as the losing parties. [Citation.] [W]e liberally construe plaintiffs' evidentiary submissions and strictly scrutinize defendants' own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiffs' favor." (*Ibid.*) However, "[w]hen opposition to a motion for summary judgment is based on inferences, those inferences must be reasonably deducible from the evidence, and not such as are derived from speculation, conjecture, imagination, or

guesswork." (*Joseph E. DiLoreto, Inc. v. O'Neill* (1991) 1 Cal.App.4th 149, 161; accord, *Aguilar, supra,* 25 Cal.4th at p. 864 ["Speculation . . . is not evidence."].)

B. Wrongful Death

Section 377.60 provides: "A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by . . . [¶] [t]he decedent's . . . children . . . ." " 'The elements of the cause of action for wrongful death are the tort (negligence or other wrongful act), the resulting death, and the damages, consisting of the pecuniary loss suffered by the heirs. [Citations.]' [Citation.]" (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1263, italics omitted.) "Wrongful act" as used in the wrongful death statute means "any tortious act." (*Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1190.) Additionally, "the plaintiff [in a wrongful death action] must prove the defendant's conduct was a substantial factor in causing the decedent's death." (*Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487, 1507, italics omitted.)

1. Moving Party's Evidence in Support of Motion

Appellant has not clearly articulated an argument that Center failed to produce evidence sufficient to carry its burden of production, which would relieve him of the burden of meeting that evidence. However, appellant continues to press objections to Dr. Holtz's declaration. Because such objections would only impact whether Center met its initial burden, we construe appellant's brief to raise such an argument, but reject it nonetheless.

Center met its burden to show that appellant could not establish one or more elements of his wrongful death cause of action by presenting the declaration of Dr. Holtz, which negated Center's negligence or wrongful conduct as a cause of death. Center further relied on decedent's medical records, as well as the deposition testimony of the medical examiner and Dr. McCormack to show there is no evidence that any act of Center, or failure to act, fell below the standard of care and caused decedent's injuries. Summarized, Center's evidence showed that decedent's death was not caused by its actions, or failure to act.

We conclude that the trial court did not abuse its discretion in overruling appellant's objections to Dr. Holtz's declaration. (See *DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679 ["We review the trial court's evidentiary rulings on summary judgment for abuse of discretion."].) Relying primarily on *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493 (*Bushling*) and *Kelley v. Trunk* (1998) 66 Cal.App.4th 519 (*Kelley*), appellant asserts that Dr. Holtz's declaration is inadequate because he fails to state the basis for his opinions. "[E]xpert opinion may not be based on assumptions of fact that are without evidentiary support or based on factors that are speculative or conjectural, for then the opinion has no evidentiary value and does not assist the trier of fact. [Citation.] Moreover, an expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more than the reasons and facts on which it is based." (*Bushling, supra,* at p. 510.)

Kelley, supra, 66 Cal.App.4th 519, is distinguishable. In *Kelley*, the court held that it was error to grant summary judgment in favor of a defendant doctor whose conclusory expert declaration provided that no medical malpractice had occurred, without explaining the basis for the opinion. (*Id.* at p. 521.) The court noted that the declaration "did not disclose the matter relied on in forming the opinion expressed" and was "unsupported by reasons or explanations . . . ." (*Id.* at p. 524.) The declaration did not describe the nature of the patient's disease, did not state whether a reasonable doctor should have recognized the possibility of severe complications allegedly suffered by the plaintiff, and did not state whether earlier intervention would have mitigated the injury. (*Ibid.*) The court also noted that even if the expert's opinion had been sufficient to support summary judgment, the plaintiff had presented an opposing expert opinion, which created a triable issue of material fact. (*Ibid.*)

In contrast, Dr. Holtz, a specialist in the field of neurology, stated that he was knowledgeable of the principles of neurological geriatric care. His education and

background were extensively detailed and he stated he was familiar with "evaluating neurological causes of death of elderly patients who have shortly before death been in a skilled nursing, acute hospitals or hospice care environments and have suffered from neurological conditions." Dr. Holtz explained that he had reviewed decedent's medical records from Center and St. Luke's Hospital. He set forth decedent's medical conditions and the events, as reflected in the medical records, of January 11, 2006. Based on his experience and knowledge, together with his review of decedent's medical records, it was Dr. Holtz's opinion that "[t]hese are the types of injuries that routinely go unnoticed in nursing facilities" and that "[i]t is very difficult to prevent these types of patients from falling." Based on his experience and knowledge, together with his review of decedent's medical records, it was Dr. Holtz's opinion that decedent "suffered an injury through no fault of the nursing staff[,]" that he "ha[d] no reason to believe that [Center] took anything other than all appropriate actions with regard to [decedent's] care[,]" and that decedent's death "was not related to anything the staff did or did not do with respect to [his] care."

In a similar case, the Third District Court of Appeal concluded: "To state that one has experience in certain medical procedures and has reviewed pertinent medical records and that based on that experience and that review, the declarant has found nothing to support a claim of medical malpractice and therefore concludes that there was none is not an improper conclusion for an expert witness. The expert has given an explanation for that expert's conclusion that defendants are not guilty of medical malpractice: Based on the expert's experience and the patient's medical records, there is no evidence to support a claim of negligence as a cause of injury. The reason for the opinion is the absence of evidence of medical malpractice. That opinion is significantly different than one that concludes that the standard of care has not been met resulting in an injury, but fails to give a reasoned explanation, based on facts and not on speculation, of why the expert has come to those conclusions." (*Bushling, supra,* 117 Cal.App.4th at p. 509.)

The circumstances here are indistinguishable. Dr. Holtz's declaration adequately explained the basis for his opinion—the absence of evidence that any conduct of Center caused decedent's subdural hematoma. *Bushling* also held that a plaintiff's expert opinion was insufficient to raise a triable issue of fact where it was based on assumed facts for which there was no supporting evidence. (*Bushling, supra*, 117 Cal.App.4th at p. 511.) Here, Dr. Holtz's opinion was not based on assumed facts, but on decedent's medical records.

2. Opposing Party's Evidence

Because Center satisfied its burden as the party moving for summary judgment, the burden shifted to appellant to present evidence showing there was a triable issue of material fact. After independently reviewing the evidence presented by appellant, we conclude no triable issue of material fact exists. Although appellant disputes Center's recitation of facts on peripheral issues, he presents no evidence to show how decedent incurred blunt force trauma to his head. The evidence before the trial court, when construed liberally in appellant's favor, showed that decedent died from complications of blunt force trauma to the head and that it was reasonable to infer decedent suffered such trauma while residing at Center. However, this is as far as the evidence, construed liberally in appellant's favor, can go.

Although appellant argues that decedent "either fell out of his chair, fell out of his bed, or was dropped by staff at the nursing home" there is simply no evidence in the record that suggests decedent did, in fact, incur head trauma in any of these ways.[14] That decedent had a bruise on his face on January 18, 2006, in no way

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[14] Appellant suggests that it must be inferred that decedent's injury was necessarily a consequence of misfeance or nonfeasance by Center personnel—at best a highly oblique allusion to the doctrine of res ipsa loquitur. "At trial, before the burden-shifting presumption [of res ipsa loquitur] arises, *the plaintiff must present some substantial evidence* of three conditions: (1) the injury must be the kind which ordinarily does not occur in the absence of someone's negligence; (2) the injury was caused by an instrumentality in the exclusive control of the defendant; and (3) the injury was not due to any voluntary action or contribution on the part of the plaintiff." (*Elcome v. Chin* (2003)

suggests that any such "incident" consistent with appellant's theories, more probably than not, occurred. (See *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483 ["We will not . . . draw inferences from thin air. Where . . . the plaintiff seeks to prove an essential element of her case by circumstantial evidence, she cannot recover merely by showing that the inferences she draws from those circumstances are *consistent* with her theory. Instead, she must show that the inferences favorable to her are *more reasonable or probable* than those against her."].)

Quite simply, the evidence shows that it is unknown how decedent incurred blunt force trauma to his head. Only speculation supports appellant's theory that "decedent's subdural hematoma was sustained by blunt force trauma to the head inflicted [by] a fall[,] which [Center] covered up to evade responsibility for decedent's death." We conclude that the trial court did not err in granting summary judgment to Center on appellant's wrongful death claim.

C. The Elder Abuse Act

"[T]he Elder Abuse Act was designed to protect elderly and dependent persons from abuse, neglect, or abandonment. [Citations.] In addition to adopting measures designed to encourage reporting of abuse and neglect ([Welf. & Inst. Code,]§ 15630 et seq.), the Act authorizes the court to award attorney fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional and reckless abuse where the elder has died." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 971-972.) A plaintiff is not "entitled to the heightened remedies of [Welfare

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110 Cal.App.4th 310, 316-317.) In opposing summary judgment, appellant did not assert res ipsa loquitur or identify any evidentiary basis for the doctrine's application. Furthermore, on appeal, appellant has not raised res ipsa loquitur or pointed to any evidence in the record that supports the doctrine's application. Accordingly, appellant has forfeited such a claim. (See *Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768 ["[t]he appellate court is not required to search the record on its own seeking error"]; *Williams v. City of Belvedere* (1999) 72 Cal.App.4th 84, 92, fn. 2 ["We decline to address this argument because [the plaintiff] never raised it in the trial court."]; *Wurzl v. Holloway* (1996) 46 Cal.App.4th 1740, 1754, fn. 1 [" '[a] point not presented in a party's opening brief is deemed to have been abandoned or waived' "].)

and Institutions Code] section 15657 unless [he or she] prove[s] statutory abuse[15] or neglect[16] committed with recklessness, oppression, fraud or malice." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 41 (*Delaney*); accord, *Mack v. Soung, supra,* 80 Cal.App.4th at p. 972 ["In order to be entitled to these heightened remedies, [Welf. & Inst. Code, §] 15657 provides that the plaintiff must establish 'recklessness, oppression, fraud, or malice in the commission of this abuse' by 'clear and convincing evidence.' "].) " 'Recklessness' refers to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur [citations][.]

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15 Welfare and Institutions Code section 15610.63 provides: " 'Physical abuse' means any of the following: [¶] (a) Assault, as defined in Section 240 of the Penal Code. [¶] (b) Battery, as defined in Section 242 of the Penal Code. [¶] (c) Assault with a deadly weapon or force likely to produce great bodily injury, as defined in Section 245 of the Penal Code. [¶] (d) Unreasonable physical constraint, or prolonged or continual deprivation of food or water. [¶] (e) Sexual assault . . . . [¶] (f) Use of a physical or chemical restraint or psychotropic medication under any of the following conditions: [¶] (1) For punishment. [¶] (2) For a period beyond that for which the medication was ordered pursuant to the instructions of a physician and surgeon licensed in the State of California, who is providing medical care to the elder or dependent adult at the time the instructions are given. [¶] (3) For any purpose not authorized by the physician and surgeon."

16 Welfare and Institutions Code section 15610.57 provides: "(a) 'Neglect' means either of the following: [¶] (1) The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise. [¶] (2) The negligent failure of an elder or dependent adult to exercise that degree of self care that a reasonable person in a like position would exercise. [¶] (b) Neglect includes, but is not limited to, all of the following: [¶] (1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter. [¶] (2) Failure to provide medical care for physical and mental health needs. No person shall be deemed neglected or abused for the sole reason that he or she voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment. [¶] (3) Failure to protect from health and safety hazards. [¶] (4) Failure to prevent malnutrition or dehydration. [¶] (5) Failure of an elder or dependent adult to satisfy the needs specified in paragraphs (1) to (4), inclusive, for himself or herself as a result of poor cognitive functioning, mental limitation, substance abuse, or chronic poor health."

Recklessness, unlike negligence, involves more than 'inadvertence, incompetence, unskillfulness, or a failure to take precautions' but rather rises to the level of a 'conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it.' [Citation.]" (*Delaney, supra,* 20 Cal.4th at pp. 31-32.)

As set forth in detail above, appellant failed to present evidence of *any conduct,* intentional or otherwise,[17] that inflicted head trauma on decedent. Because appellant cannot show a triable issue of material fact that Center acted negligently, it is clear that appellant cannot meet the higher burden, required under the Elder Abuse Act, of showing, by clear and convincing evidence, that Center acted recklessly, or is guilty of oppression, fraud, or malice. (See Welf. & Inst. Code, § 15657; *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 785 [higher standard imposed by Welf. & Inst. Code, § 15657 protects health care providers from liability under the statute "for acts of simple or even gross negligence"]; *Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 83 ["[A]t a minimum, a showing of reckless neglect within the meaning of [Welf. & Inst. Code, §]15657 is required to obtain the enhanced remedies of the Elder Abuse Act."].) Center's reckless neglect cannot be inferred simply because decedent suffered a serious injury. We conclude that the trial court did not err in granting summary judgment against appellant's elder abuse claim.[18]

The trial court properly granted Center's motion for summary judgment and entered judgment in its favor.

III. DISPOSITION

The judgment is affirmed. Center is to recover costs on appeal.

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[17] Contrary to appellant's assertion, the medical examiner did not conclude that decedent sustained the head trauma "either at the hands of another or by accident." Rather, she stated that she "d[id]n't have any indication" that decedent died at the hands of another.

[18] Accordingly, we need not address appellant's arguments regarding punitive damages.

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Bruiniers, J.*

We concur:

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Jones, P. J.

_____
Needham, J.

* Judge of the Contra Costa County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.